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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948.

No. 25

AYRSHIRE COLLIERIES CORPORATION, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

Appeals from the United States District Court for the Southern District of Indiana.

Memorandum Showing Distinctions Between the Issues, Evidence, and Principles of Law Involved in United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 294 U. S. 499, and Those Involved in Ayrshire Collieries Corporation, et al. v. United States, No. 25, October Term, 1948, Submitted By Railroads and Producer Associations, Appellees, in the Latter Proceedings, in Response to Request of Justice Felix Frankfurter.

ERLE J. ZOLL, JR.,
CHARLES W. STADELL,
A. E. FUNK,
M. B. HOLIFIELD,
J. E. MARKS,
Attorneys for Appellees.

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During the argument before this Honorable Court in the case at bar, on November 15, 1948, counsel for appellants contended that this Court's decision in *U. S.* v.

C. M. St. P. & P. R. Co., 294 U. S. 499, is controlling and determinative of its decision in the case at bar. Counsel for appellees contended, on the contrary, that this Court's decision in such case is in no way determinative of the decision which the Court should arrive at in the case at bar, because the issues, evidence, and principles of law involved in the proceedings before the Interstate Commerce Commission in I&S Docket No. 3843, *Coal from Indiana to Illinois*, 197 I.C.C. 245; 200 I.C.C. 609, the order in which was the subject of this Court's opinion and decision in *U. S.* v. *C. M. St. P. & P. R. Co., supra,* were entirely different from the issues, evidence, and principles of law involved and the findings made by the Commission with respect thereto in its report in I&S Docket No. 5139, *Coal to Beloit, Wisconsin and Northern Illinois*, 263 I.C.C. 179, the order in which appellants request this Court to perpetually enjoin in the instant case.

Near the conclusion of the argument in the instant case, the Honorable Justice Felix Frankfurter, asked counsel presenting the argument for the railroads and coal producer associations, appellees, if he would furnish the Court with a memorandum outlining his views with respect to the distinctions between *U. S.* v. *C. M. St. P. & P. R. Co., supra*, and the case now before the Court. This memorandum is submitted in response to that request.

In order to understand the basis for the decision of the Court in *U. S.* v. *C. M. St. P. & P. R. Co., supra,* we must examine the Commission's reports in *Coal from Indiana to Illinois*, 197 I.C.C. 245; 200 I.C.C. 609, to ascertain what issues were before the Commission in that proceeding. In the latter proceeding the only rates involved were those which were contained in tariffs filed by the Milwaukee to become effective December 23, 1932,

which would reduce the rates from origins served by the Milwaukee in the Brazil and Linton, Indiana, districts, only, over its single-line routes, to Rockford and Freeport, Illinois, by 17 cents a ton, and to certain intermediate points between the origins and destinations involved by amounts ranging from 4 cents to 10 cents per ton (294 U. S. 499, 501).

In the proceeding before the Commission the only issues were with respect to whether or not the proposed reduced rates of the Milwaukee were unreasonable in violation of section 1(5) and whether they would, if permitted to become effective, result in rates from the origins served by the Milwaukee, or as a consequence of reductions which might be made by other railroads in competition with the Milwaukee from other mines or origin points served by them, on a basis so low as to jeopardize their ability to receive revenues sufficient to maintain an adequate and efficient transportation service.

In its report in *Coal from Indiana to Illinois*, 200 I.C.C. 609, the Commission entered an order requiring the Milwaukee to cancel the tariff schedules containing the reduced rates proposed by it on the ground that such rates would lead to a disruption of the rate structure in Indiana, to a disruption of the long-standing rate relations between the Indiana groups, and would thus impair the revenues of the railroads serving Indiana and their ability to provide the adequate and efficient service contemplated by section 15 of the Interstate Commerce Act. The proposed rates were for those reasons found unreasonable (Pp. 505-6).

The Court observed that the finding of unreasonableness was predicated simply on the conclusion that the proposed rates would disrupt the rate structure, groupings, and differentials in Indiana. The Court held this

was inadequate support for the finding of unreasonableness. Every change in rate is a disruption of the rate structure theretofore prevailing. There was nothing to show that other railroads serving Indiana could not make similar reductions as those proposed by the Milwaukee, and still have rates that would be compensatory and that would not jeopardize or impair their service. If they would suffer revenue losses by making such reductions, the Commission should have made findings as to the extent of the expected loss (Pp. 506-8).

The Court observed that the Commission had not held that the Milwaukee's proposed reduced rates from Indiana would result in an unfair relation with the rates from the Springfield, Illinois, or any other origin group in Illinois, Indiana or western Kentucky (p. 508).

It had been argued to the Court that the disruption resulting from the Milwaukee's proposed reductions would spread and lead to a rate war among the Illinois, Indiana and Kentucky carriers. The Court said, however, that the threat of such a rate war might be "a reason for rejecting a new schedule [1] if the rate relation previously existing is a fair one, or [2] even, we may assume, if the Commission is without power to avert the reprisals and thereby nullify the threat. Neither of these conditions is satisfied in this case." (p. 509).

As to [1], the Court said that these proposed reduced rates of the Milwaukee could not be held unreasonable on the ground that they would lead to disruption and destruction of the existing rate adjustment, because the "Commission does not hold that the existing rate relation is intrinsically sound and fair. On the contrary, it expressly concedes that the rate situation as between

the Illinois and Indiana groups may be in need of correction, * * *. The point of the decision is not that present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control." (p. 509). In its conclusion, the Court said that the Commission had required continuance of a relationship between Illinois and Indiana, the lawfulness of which it had not adjudged. It had prevented the Milwaukee's changing this relationship but had taken no action toward seeing whether the relationship was lawful and, if it were not lawful, putting it on a lawful basis (p. 510). The Court said that there were indeed suggestions in the Commission's report that the proposed rates of the Milwaukee would result in an unfair relation between those rates and the existing rates from Springfield. The Court said, "The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude" (p. 510).

As to [2], the Court said the Commission could not hold proposed reduced rates unreasonable solely on the ground they would lead to disruption of the rate adjustment, because the Commission had power to prevent any disruption. "The danger [of such a disruption] is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds. If Illinois lines attempt to lower their rates again, a proceeding will be available to maintain a fair relation. If the lines in Kentucky, operating in interstate commerce, apply for new reductions, the supervisory power of the Commission will subject them to the rule of reason. But other remedies even more plainly adequate are at hand in case of need. Under § 15 of the statute the Commission of its own motion may con-

duct a comprehensive inquiry into the rates of all the lines within the area of controversy, may fix the fair relation between one line and another, and may build the structure of the rates accordingly." (pp. 509-510).

The proceeding now before this Court (No. 25, Oct. Term, 1948, *Ayrshire Collieries Corp.* v. *United States*) presents a situation wholly unlike the situation confronting the Court in 294 U. S. 499. In the Commission's report now under attack, the Commission referred to the Court's opinion in 294 U. S. 499, and to the criticisms the Court had made of its previous report and order. The Commission recalled that the Court had said the Commission had "not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates," that "the whole situation is subject to the power of the Commission," in that it "may fix the fair relation between one line and another, and may build the structure of the rates accordingly." (R. 184). In this new proceeding the Commission had before it and under investigation all the intrastate and interstate rates of all the carriers serving Illinois, Indiana and western Kentucky mines—the entire midwestern coal field—to a large destination area in northern Illinois and to Beloit, Wisconsin. There are 30 origin points in the Brazil, Indiana, group, only 4 of which are served by the Milwaukee, and there are 31 origin groups in the Linton, Indiana, group, only 9 of which are served by the Milwaukee. The other origin points in such groups are served by other railroads which do not reach the destination territory involved (except the Illinois Central from the Linton group) and with which the Milwaukee and Illinois Central join in joint through rates which are 17 cents per ton higher from such origins in the Brazil group and 12 cents per ton higher from such origins in the

Linton group than were maintained by the Milwaukee over its single-line routes from origins served by it in such groups to Rockford and Freeport. In *Coal from Indiana to Illinois*, 200 I.C.C. 609, the only rates before the Commission were those published by the Milwaukee from the few mines and origin points it served in the Brazil and Linton, Indiana, groups to Rockford, Freeport, and a few other intermediate points in northern Illinois. Contrasted with that, the record in these latest proceedings before the Commission, I. & S. Docket 5139, *Coal to Beloit, Wis., and Northern Illinois, and* No. 28881, *Bituminous Coal Rates Within Illinois*,* which were heard on a consolidated record, involves the entire interrelated rate structure from all of the origin points and mines in the Illinois, Indiana, and western Kentucky origin groups, which aggregate 279 origins in the 8 Illinois groups, 101 origins in the 4 Indiana groups, and 57 origins in the western Kentucky group (Ex. 3, sec. II. R. 1675-1701). Exhibits 2 and 39 before the Commission show, moreover, that the destination territory was of very wide extent, comprising a large area in northern Illinois and Beloit, Wisconsin. As the Commission says in its report, over 70 destinations were involved (R. 171, 1675-1701).

Therefore, in this proceeding it is not the rates of the Milwaukee alone that are involved but rather the rates of all the 40 or more carriers which participate in the transportation of coal as origin, intermediate, or delivering lines from these origins to the destinations referred to. The order of the Commission, therefore, in these proceedings, with respect to the rates and rate relations which it required to be established is directed not only to the Milwaukee but to all of such railroads.

* Although the I. & S. proceeding and the intrastate proceeding, No. 28881, are dealt with and decided under separate headings in the report, the issues in the two proceedings are so closely related that the discussion of rates and differentials is necessarily overlapping.

Having such a comprehensive record before it, in a proceeding where was presented the lawfulness of the extensive rate structure under all sections of the Act, the Commission said:

> "Accordingly, the record herein being adequate for the purpose, we shall now proceed *to a determination of the fair and reasonable relations which should exist* between the respective origin groups, and between the Indiana and Illinois groups, to these destinations, * * *." (R. 184. Emphasis supplied).

The next section of its report is entitled *"The Fair and Reasonable Origin Relations"* (R. 184), and in it the Commission, basing its determinations on comparative mileage and on transportation conditions, and on competitive conditions, which it stated are reflected in statistics of production and tonnages moved from the respective groups (R. 184-6), proceeds to fix the lawful relations between the respective origin groups. At R. 186-7 it finds that the rates from the Boonville group should be the same as the rates from the Princeton group; at R. 187 it finds that the lawful differential between the Brazil group and the Linton group should be 10 cents; at R. 190 it approves the existing differential of 7 cents between the Linton group and the Princeton group. At R. 187-9, it requires revision in certain rates from the Illinois groups of Fulton-Peoria, Danville, and DuQuoin. As its report indicates, it considered the relationship between all other groups in the midwestern field, and at R. 191 it states that such rates and relationships set forth in Appendix A to the report, will be fair and reasonable, "both as between the respective origin groups and as between the Indiana groups on the one hand, and the Illinois groups on the other." It reiterates this finding at R. 210 and R. 212.

In short, in this case the Commission has fixed the rates from and the relations subsisting between the Illinois groups, between the Indiana groups, and between the Illinois groups, on the one hand, and the Indiana groups, on the other, and has built the structure of the rates accordingly.

Finally, it is evident that the basis for the Commission's determination in *Coal from Indiana to Illinois*, 200 I.C.C. 609, and the findings made by the Commission in support of that order, were entirely different from the findings and conclusions of the Commission in the proceedings which are now before this Court for review. In the former case the Commission's order was based on violations of Sections 1(5) and 15a(2) of the Act, and the Court held the order invalid for lack of sufficient findings and for lack of substantial evidence. The Court said that for all that appeared, the Milwaukee's proposed rates were within the zone of reasonableness, adding, "We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute." (p. 506). In the Commission's report now before the Court, the Commission described the basis for its prior order, held invalid in 294 U. S. 499, and said that the question of the lawfulness of the dual basis of rates was "squarely before us here." (R. 179). And in its report and order now under attack, it bases its action not only on Section 1, but also Sections 2 and 3(1). (R. 210-211). The differences between the decision in 294 U. S. 499, and the situation now before the Court are, we submit, basic, and result in the former opinion of the Court not being controlling here. The issues involved, the adequacy of the evidence, and the Commission's findings to support the order now before the Court are fully discussed in our

brief, to which, in order to avoid undue repetition, we respectfully direct the Court's attention.

Respectfully submitted,

ERLE J. ZOLL, JR.,
Attorney for The Alton Railroad Company (Henry A. Gardner, Trustee), et al.,
Railroad Appellees.

CHARLES W. STADELL,
Attorney for Central Illinois District Coal Traffic Bureau and Illinois Coal Traffic Bureau,
Appellees.

A. E. FUNK,
Attorney General of Kentucky,

and

M. B. HOLIFIELD,
Assistant Attorney General Kentucky,
For the Railroad Commission of Kentucky, Appellee.

J. E. MARKS,
Attorney for Kentucky Coal Agency, Inc., Appellee.

Chicago, Illinois.
November, 1948.